

RULEMAKING NOTICE FORM

Notice Number _____	Rule Number _____	He-P 3205.02(e)(1)
1. Agency Name & Address: NH Dept. of Health & Human Services Division of Public Health Services Nutrition Services Section 29 Hazen Drive Concord, NH 03301	2. RSA Authority: RSA 132:10-b, I 3. Federal Authority: 7 CFR 246.12 4. Type of Action: Adoption _____ Amendment X _____ Repeal _____ Readoption _____ Readoption w/amendment _____	

5. Short Title: **Special Supplemental Nutrition Program for Women, Infants and Children (WIC) – Price of Infant Formula and Foods**

6. (a) Summary of what the rule says and of any proposed amendments:

The Department of Health and Human Services (Department) proposes to amend He-P 320502(e) on the written agreement for vendor participation in the Women, Infant, and Children (WIC) program by deleting He-P 3205.02(e)(1) which prohibits the shelf price of infant formula and foods to exceed 120 % of the manufacturer's wholesale price.

The proposed rule removes the 120% cap as the means by which the Department sets a fair price for Women, Infant, and Children (WIC) program products such as infant formula and foods. The price for infant formula and foods is set by means of a peer group process methodology based on requirements of 7 CFR 246.12(g)(4)(f)(ii). Vendors are categorized into peer groups based on similar characteristics such as geographic location, number of registers, square footage and sales volume. The proposed amendment sets a price for infant food and formula which is determined by adding a standard deviation of 1.5 to the average price of the peer group. The cap stated in the existing He-P 3205.02(e)(1) is no longer the process that 7 CFR 246.12(g) requires. The proposed amendment uses a peer group pricing methodology that will continue to ensure competitive pricing and compliance with federal regulations.

The Department's methodology conducts a price survey collecting pricing from active WIC vendors in the peer group twice a year. The Department determines a price cap for each WIC food item within each peer group. The price cap is calculated using the average price for the peer group, plus one and a half times the standard deviation [average price + (1.5 x SD)= price cap]. The standard deviation is a complex formula that looks at how the numbers are spread out. This formula has been recommended by USDA in establishing price caps.

If a certain food item has had an increase in price, the Department could recalculate a new price cap based on the most current prices on record by vendors in the peer group. Price caps within a peer group are only adjusted if 50% or more of the peer group has had an increase in price of that product. Peer group price caps are not shared with vendors. When a vendor's price exceeds the price cap of the its peer group for a specific WIC food, the vendor is informed and the voucher amount is adjusted to the price cap.

6. (b) Brief description of the groups affected:

The proposed amendment will affect vendors of WIC infant food and formula some of whom have been paying an increased fee from distributors of infant food and formula. There will be no increase to recipients seeking to purchase infant food and formula.

6. (c) Specific section or sections of state statute or federal statute or regulation which the rule is intended to implement:

Rule	State or Federal Regulation Implemented
He-P 3205.02(e)(1)	7 CFR 24.12(g)

7. Contact person for copies and questions including requests to accommodate persons with disabilities:

Name: **Catherine Bernhard** Title: **Rules Coordinator**
Address: **Dept. of Health and Human Services** Phone #: **271-9374**
Administrative Rules Unit Fax#: **271-5590**
129 Pleasant St. E-mail: catherine.l.bernhard@dhhs.state.nh.us
Concord, NH 03301

TTY/TDD Access: Relay NH 1-800-735-2964 or dial 711 (in NH)

The proposed rules may be viewed and downloaded at:

<http://www.dhhs.nh.gov/oos/aru/comment.htm>

8. Deadline for submission of materials in writing or, if practicable for the agency, in the electronic format specified: **Thursday, April 13, 2017**

☒ Fax

☒ E-mail

☐ Other format (specify):

9. Public hearing scheduled for:

Date and Time: **Thursday, April 6, 2017 9:30 a.m.**

Place: [**DHHS Brown Bldg., Room 232, 129 Pleasant St., Concord, NH**](#)

10. Fiscal Impact Statement (Prepared by Legislative Budget Assistant)

FIS # 17:017, dated 02/21/17

1. Comparison of the costs of the proposed rule(s) to the existing rule(s):

When compared to the existing rule, the proposed rule may increase federal expenditures for Women, Infants, and Children (WIC) program, and benefit independently-owned businesses to the extent that they are WIC vendors who sell infant formula and food.

2. Cite the Federal mandate. Identify the impact of state funds:

7 CFR 246.12(g)(4)(f)(ii) requires all states to use peer grouping data to determine the price at which vendors can sell infant formula and foods.

3. Cost and benefits of the proposed rule(s):

The current rule prohibits the shelf price of infant formula and foods to exceed 120 percent of the manufacturer's wholesale price. The proposed rule removes the 120 percent cap, replacing it with a methodology that sets the cap by adding a standard deviation of 1.5 to the average price of the peer group.

A. To State general or State special funds:

The proposed rule may increase costs to the WIC program, to the extent that the cap under the proposed methodology exceeds the 120 percent cap. As the WIC program is fully federally funded, there is no impact on state funds.

B. To State citizens and political subdivisions:

None.

C. To Independently owned businesses:

The proposed rule may benefit WIC vendors, to the extent that the cap under the proposed methodology exceeds the 120 percent cap. The Department notes that under the existing rule, some small vendors sold infant formula and foods at a loss.

11. Statement Relative to Part I, Article 28-a of the N.H. Constitution:

The proposed rule modifies an existing program or responsibility, but does not mandate any fees, duties or expenditures on the political subdivisions of the state, and therefore does not violate Part I, Article 28-a of the N.H. Constitution.

Amend He-P 3205.02(e)(1), effective 10-1-14 (Document #10583), to read as follows.

(e) Retail food stores shall be issued restricted vendor agreements which shall not allow the provision of infant foods when:

- ~~(1) The shelf price of WIC approved contract infant formula and foods exceeds 120% of the manufacturer's wholesale price;~~
- (~~2~~1) The retail food store submits a request, orally or in writing, to the department;
- (~~3~~2) The department determines a restricted agreement is required based on cost or inventory concerns; or
- (~~4~~3) The department determines a restricted agreement is required based on a retail food store's infant formula or infant food costs to the department in relation to the store's reported infant formula prices.

Appendix

Rule	State or Federal Regulation Implemented
He-P 3205.02(e)(1)	7 CFR 24.12(g)